

CHRISTOPHER J. CANNON, State Bar No. 88034
Sugarman & Cannon
44 Montgomery Street, Suite 2080
San Francisco, CA 94104-6702
Telephone: 415/362-6252
Facsimile: 415/677-9445

Attorney for Defendant Jose Jesus Martinez

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

| | | |
|--------------------------|---|--------------------|
| UNITED STATES OF AMERICA |) | No. CR-07-00793 CW |
| |) | |
| Plaintiff, |) | SENTENCING |
| |) | MEMORANDUM |
| v. |) | |
| |) | |
| |) | |
| JOSE JESUS MARTINEZ |) | |
| |) | |
| Defendant. |) | |
| |) | |
| |) | |

I. INTRODUCTION

Jose Jesus Martinez is a 34-year-old man who will be in custody for the next ten years of his life. Ten years in prison is more than enough time to satisfy all of the factors set out in 18 U.S.C. § 3553. Upon his release, he will be 44 years old and the probability of recidivism will be drastically reduced. The activities leading to the conviction in this case are those of a low-level drug user and minor dealer who was in the drug business in an attempt to take care of his family. Under these circumstances any sentence of more

SENTENCING MEMORANDUM

1 than 10 years would be grossly disproportionate to the conduct that brings him before this
2 Court.

3 **II. A DOWNWARD DEPARTURE IS APPROPRIATE IN THIS CASE**

4 A downward departure is appropriate in this case because Mr. Martinez's
5 classification as a career criminal grossly overstates the likelihood of recidivism in this
6 case. Unlike most career offenders, Mr. Martinez has the bare minimum of two
7 convictions that qualify him for career offender status. The first of those convictions is
8 almost beyond the 15-year time period for qualification as a career offender.
9

10 Under the sentencing guidelines, the role prior convictions play in sentencing is
11 presumptive, not conclusive. In United States v. Reyes, 8 F.3d 1379 (9th Cir. 1993), long
12 before Booker¹, the District Court departed downward from a career offender guideline
13 range of 210 to 262 months to a 33-month sentence on the ground that the career offender
14 sentencing range overrepresented "the relative lack of seriousness of the offenses and
15 history that put him into career offender status." United States v. Reyes, 8 F.3d at 1387.
16 The Ninth Circuit approved² the departure even though the illegal alien defendant's
17 criminal history included six prior convictions, resulting in a criminal history category of
18 V.
19

20 In affirming the District Court's grant of a downward departure of more than 14
21 years (177 months) despite the defendant's career offender status, the Reyes Court
22

23 ¹ United States v. Booker, 543 U.S. 220 (2005).

24 ² The case was remanded so that the District Court could articulate the reasons for its
25 departure.

26 SENTENCING MEMORANDUM

1 recognized, even before Kimrough v. United States, 128 S.Ct. 558 (2007), and Gall v.
2 United States, 128 S.Ct. 586 (2007), the established principle that a downward departure is
3 permissible under the guidelines and Ninth Circuit authority. United States v. Reyes, 8
4 F.3d at 1383 (citing United States v. Lawrence, 916 F.2d 553 (9th Cir. 1990)). A
5 downward departure is also warranted if a mitigating circumstance is present that the
6 Sentencing Commission failed to take into account “*to a sufficient ‘degree’*” (Id. at 1385
7 (citing 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0) (emphasis added)), or if a combination of
8 factors render the presumptive guideline sentence excessive. United States v. Cook, 938
9 F.2d 149, 153 (9th Cir. 1991).

12 The Reyes Court departed based upon the grossly disproportionate effect some
13 criminal records and offense conduct can lead to under the guidelines:

15 On this view, the problem is not that the Commission
16 did not take into consideration the relationship between
17 quantity and penalty, but that it did not adequately do so
18 because it did not focus sufficiently on the resulting
19 disproportionate punishment accorded career offenders in the
20 same category.

20 Id. at 1385.

21 In other words, some guideline categories impose virtually the same punishment on
22 defendants with widely varying criminal histories. By giving like punishment to offenders
23 with unlike offenses and/or widely varying criminal histories, some offenders receive
24 punishment disproportionate to their criminal conduct.

26 Reyes discusses the tension between two key aspects of the guidelines: (1) the
27 fundamental principle of proportionality; and (2) the emphasis on categories, not

28 SENTENCING MEMORANDUM

1 individual cases, in an aggregate sentencing system. Proportionality requires that
2 offenders receive “appropriately different sentences for criminal conduct of differing
3 severity.” Id. at 1385 (quoting U.S.S.G. § 1A.3 (introductory comment)). As the Reyes
4 Court noted, proportionality is one of the three principles upon which the guidelines are
5 founded. Id.

7 In some cases such as this, this principle of proportionality can be undermined by
8 the aggregate nature of the guideline system unless a downward departure is granted.

10 The guidelines contain an extensive set of rules for grouping individual offenders
11 together in final categories, and a table or grid that assigns a sentence range for all
12 members of these various final categories. This aggregative approach, aimed at decreasing
13 disparity in sentencing, carries with it the danger that because an offender’s sentence
14 results from a grouping, unique characteristics attaching to that offender are not credited
15 and the presumptive sentence may be disproportionate to the nature of the offender and his
16 or her offense conduct. In a penetrating critique of aggregative sentencing systems, a
17 prominent author concludes:
18
19

20 [S]entencing guidelines reflect a larger movement in
21 legal and social thought. These guidelines also mark a
22 changed attitude toward sentencing – one that looks to
23 collections of cases and to social harm rather than to
24 individual offenders and the punishments they deserve. The
25 army that America is marching into its prisons and jails may
26 merit incarceration, but these defendants deserve sentences
27 based on more than rough aggregations and statistical
28 averages. They and we deserve sentences based on the
circumstances of their cases.

Alschuler, The Failure of Sentencing Guidelines: A Plea For Less Aggregation, U. Chi. L.

SENTENCING MEMORANDUM

1 Rev. 901 (1991) (cited in Reyes, 8 F.3d. at 1385 n. 14).

2 The Reyes Court acknowledged that this tension between proportionality and
3 aggregation is “an appropriate concern to be considered when deciding to depart.” Id. at
4 1385 n. 14.

5
6 Thus, the moral of Reyes is that because some guideline categories clump together
7 and thereby impose much the same sentence on offenders with widely different criminal
8 histories and offense conduct, the sentencing court should consider a downward departure
9 for defendants whose history and conduct are less than the average defendant with the
10 same criminal history.

11
12 This case is a good example of the problems which result from an aggregative
13 sentencing system and demonstrates why the downward departure is needed. Jose Jesus
14 Martinez is not a violent criminal or a dangerous man. The offense conduct in this case
15 demonstrates that he was just a low-level street dealer, dealing drugs to support his family
16 and his own drug habit. He made three small sales to an undercover agent and was
17 arrested, peacefully, in possession of drugs, completely consistent with his low-level
18 behavior. Unfortunately, his relatively limited prior offenses qualify him as a career
19 offender and place him at the top of the guidelines. That “qualification” grossly overstates
20 the likelihood of recidivism in this case.

21
22 Although Mr. Martinez does have one prior in which a person was injured, that
23 conviction occurred more than 15 years ago and the three-year sentence that he received
24 for that conviction indicates the extenuating circumstances surrounding that event. Since
25
26
27
28

SENTENCING MEMORANDUM

1 that conviction, Mr. Martinez has not been involved in any type of violent activity. In fact,
2 in the possession conviction that led to his federal supervised release, Mr. Martinez was
3 arrested attempting to run from a confrontation with the police. There were no allegations
4 that he engaged in any threatening behavior.

5
6 Certainly, Mr. Martinez has a history of drug and alcohol use, and an arrest pattern
7 that is consistent with that lifestyle. With one 15-year-old exception, however, his crimes
8 have not endangered anyone else and have all been linked to his drug use. Unfortunately,
9 following his last conviction, he did not have the opportunity to participate in drug
10 treatment and soon after his release, relapsed into problems with drug and alcohol. The
11 likelihood of those problems continuing can be addressed by a recommendation that Mr.
12 Martinez participate in the RDAP program while in custody. Drug treatment, and ten
13 years of maturity, provide a real hope that this will be the last time Mr. Martinez stands
14 before this, or any other, court.

15
16
17 This case is a good example of the problems which result from an aggregative
18 sentencing system and demonstrates why the downward departure is needed. When this
19 case was in state court, there was a half time 8-year offer on the table, and Martinez's
20 experienced state court lawyer, V. Roy Lefcourt, thought he would get a better deal.
21 Instead, Mr. Martinez was swept up *as a buyer* in a Federal wiretap investigation of his
22 source. That wiretap is useful, however, because it reveals only actions consistent with
23 Mr. Martinez's low place in the drug business. He made three small sales. This is not a
24 man engaged in large drug transactions. If a downward departure is not granted, the final
25
26
27
28

SENTENCING MEMORANDUM

1 sentence will be grossly disproportionate to the conduct and criminal history involved.³

2 In United States v. Sanchez-Rodriguez, 161 F.3d 556 (9th Cir. 1998), the Ninth
3 Circuit specifically recognized that the minor nature of the current offense and the minimal
4 qualifications as a career offender may qualify a defendant for a downward departure. In
5 that case, over strenuous government objection, Judge Illston departed from a guideline
6 sentence of 77 to 96 months to a 30-month sentence. In this case, we are asking for a far
7 smaller departure and the government has agreed to a sentence in the range we are
8 requesting.
9

10 This recommendation by the government is important because the Ninth Circuit
11 recognized and approved in United States v. Camarillo-Tello, 236 F.3d 1024 (9th Cir.
12 2001), plea bargains that include a specific downward departure recommendation.
13 Although there is no specific recommendation for a downward departure here, the
14 government has specifically approved a sentence range beginning at ten years. The
15 governmental approval of that range also makes a downward departure in this case
16 appropriate.
17

18 The guidelines themselves authorize downward departure “where the court
19 concludes that a defendant’s criminal history category significantly over-represents the
20 seriousness of a defendant’s criminal history or the likelihood that the defendant will
21 commit further crimes.” U.S.S.G. § 4A1.3. As calculated, the criminal history calculation
22

23
24
25
26 ³ In Nichols v. United States, 511 U.S. 738 (1994) (J. Souter, concurring), Justice Souter
27 again emphasized that downward departures are appropriate when a defendant’s criminal
28 record over-represents either the seriousness of his past conduct or the likelihood of
recidivism.

SENTENCING MEMORANDUM

1 grossly over-represents Mr. Martinez's potential for recidivism.

2 In Booker, the Supreme Court held that district courts must consider the guideline
3 range as advisory, not mandatory, and that they must also consider the other directives set
4 forth in 18 U.S.C. § 3553(a). Id. at 764-65.

5
6 Section 3553(a) requires courts to "impose a sentence sufficient, but not greater
7 than necessary, to comply with the four purposes of sentencing set forth in Section
8 3553(a)(2):
9

10 (a) retribution (to reflect seriousness of the offense, to promote respect for
11 the law, and to provide "just punishment");

12 (b) deterrence;

13 (c) incapacitation ("to protect the public from further crimes"); and

14 (d) rehabilitation ("to provide the defendant with needed educational or
15 vocational training, medical care, or other correctional treatment in the most
16 effective manner").
17
18

19 The sufficient-but-not-greater-than-necessary requirement is often referred to as the
20 "parsimony provision." That tenet instructs "district courts to 'impose a sentence
21 sufficient, but not greater than necessary' to accomplish the goals of sentencing." United
22 States v. Rodriguez, 527 F.3d 221 (1st Cir. 2008) (citing Kimbrough, 128 S.Ct. at 570).

23
24 The parsimony provision is not just another factor to be considered along with the others
25 set forth in Section 3553(a); it sets an independent limit on the sentence a court may
26 impose.
27
28

SENTENCING MEMORANDUM

1 In determining the sentence minimally sufficient to comply with the Section
2 3553(a)(2) purposes of sentencing, the Court should consider several factors listed in
3 Section 3553(a). These are:

- 4 (1) “the nature and circumstances of the offense and the history and
5 characteristics of the defendant;”
6
- 7 (2) “the kinds of sentences available;”
8
- 9 (3) the guidelines and policy statements issued by the Sentencing
10 Commission, including the (now non-mandatory) guideline range;
11
- 12 (4) the need to avoid unwarranted sentencing disparity; and
13
- 14 (5) the need to provide restitution where applicable.

15 Neither the statute itself nor Booker suggests that any one of these factors is to be
16 given greater weight than any other factor. However, it is important to remember that all
17 factors are subservient to Section 3553(a)’s mandate to impose a sentence not greater than
18 necessary to comply with the four purposes of sentencing.

19 Here, all of the Section 3553 factors call out for a sentence at the bottom of the
20 negotiated range and outside of the guidelines, or ten years. Even a ten-year sentence,
21 however, is too much in this case.
22

23 These are nonviolent crimes which occurred when Jose Martinez had relapsed into
24 drug use and were motivated by a misguided desire to take care of his family, only after
25 Martinez had exhausted many other avenues of employment. A ten-year sentence is a
26 huge punishment and, compared to the effective length of the offer in the state court,
27
28

SENTENCING MEMORANDUM

1 which is a reasonable approximation of what the community believes is an appropriate
2 sentence for the nonviolent crime charged here. A ten-year sentence is almost 250%
3 greater than what Alameda County thought was appropriate in this case.
4

5 If the random nature and length of sentences are in fact deterrents, this vast
6 difference between the proposed state sentence and the serendipitous federal sentence here
7 will deter both Mr. Martinez and anyone who learns of his fate. Mr. Martinez will be away
8 from the lives of his children for ten years. That is more than enough time to think about
9 his mistake.
10

11 There is no need to make restitution here. Mr. Martinez neither harmed anyone nor
12 took something from someone. He sold drugs to an undercover agent on three separate
13 occasions and was paid less than \$1200.00. His profit would be some small fraction of
14 that. The government got what it paid for. Mr. Martinez is receiving far more than his
15 due.
16

17 Finally, the length of the sentence in this case indicates that the likelihood of
18 recidivism will be reduced. The Parole Commission has long recognized that many
19 criminal offenders eventually "burn out" as the aging process catches up with them. In
20 recognition of this factor, the Parole Commission recomputed the parole eligibility of
21 older, parole-eligible inmates. In a 1984 study by the Commission's Research Office
22 entitled "Burnout-Age At Release From Prison and Recidivism," it was found that
23 recidivism rates do decline with increased age. Federal Register, Vol. 60, No. 69, 18378.
24 Upon his release, Mr. Martinez will be in his forties and, while that is an age counsel views
25
26
27
28

SENTENCING MEMORANDUM

1 as the prime of life, statistics show that crimes, particularly drug crimes, decline with age.

2 **III. CONCLUSION**

3 Mr. Martinez is obviously a flawed man and has wasted large portions of his life.

4 As the Court can tell from the letters that the people who know him best, however, he has
5 not been a total failure. He has tried to help others and remain in contact with his children.
6

7 While he is far from a perfect role model, he has done what he can to improve the lives of
8 those around him, and those individuals have expressed their support with letters to the
9 Court. A sentence of more than ten years will serve no additional purpose and will charge
10 society the costs of warehousing a human being for an additional six years. Accordingly, a
11 ten-year sentence, the bottom of the range agreed to by the parties, is an appropriate
12 sentence in this case. No more time is needed to deter, incapacitate, send a message to the
13 community and give Mr. Martinez time to grow into middle age.
14
15
16

17 Date: July 18, 2008

Respectfully submitted:

18 /s/Christopher Cannon

19 Christopher J. Cannon

20 Attorney for Jose Jesus Martinez
21
22
23
24
25
26
27
28

SENTENCING MEMORANDUM

PROOF OF SERVICE BY MAIL

I, the undersigned, declare:

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 years and not a party to the within action; my business address is 44 Montgomery Street, Suite 2080, San Francisco, California 94104.


On July 18, 2008, I served the within:

SENTENCING MEMORANDUM

on the parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

Daniel Kaleba
United States Attorney's Office
1301 Clay Street, Suite 340S
Oakland, CA 94612

I declare under the penalty of perjury that the foregoing is true and correct, and that this declaration was executed on July 18, 2008, at San Francisco, California.



Elisa Lee

SENTENCING MEMORANDUM